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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1516

FIRE OFFICERS UNION, *et al.*,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Plaintiff-Respondents

AND

JOSEPH R. RIZZO, *et al.*,
Defendant-Respondents

BRIEF FOR DEFENDANT-RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Brief For Defendant-Respondents in Opposition To Petition For Certiorari

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTIONS PRESENTED

1. Whether the District Court properly denied the petition to intervene.

2. Whether the Court of Appeals properly denied Petitioners' appeal of the merits because they were not parties below.

STATUTE INVOLVED

Federal Rules of Civil Procedure, Rule 24(a)(2), Title 28 U.S.C.:

"Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

STATEMENT OF THE CASE

Defendant-Respondents adopt the factual statement of the Court of Appeals as set forth in its Opinion at pages A-3 through A-7 of Appendix A of the Petition of Certiorari. However, in restating arguments which were previously made to the Third Circuit Court below, Petitioners have made several misstatements to which Defendant-Respondents feel obliged to respond. In particular Petitioners again claim that it was on December 27, 1974, that they first became aware of the fact that the question of promotions within the Fire Department was being considered by the District Court. Petitioners assert that at that point in the history of this litigation, they concluded that Defendants' counsel "were no longer protecting their [Petitioners'] interest. . . ."

To the contrary, Petitioners were on notice that the issue of promotions, though not addressed at the July, 1974 preliminary injunction hearing, was a major element of the Plaintiff-Respondents' complaint.

As to the averments that Defendants' counsel did not protect Petitioners' interest, this Court should take notice of both the District Court's and the Third Circuit Court's Opinion in this regard. District Court made the following finding, set forth at page 1780 of the Appendix filed with the Third Circuit Court of Appeals:

> "With respect to the question of the necessity of intervention as a means of preserving the applicant's rights, this Court is of the position that the rights of all firemen and officers to promotion within the Fire Department were adequately and fully protected by the City of Philadelphia and the Philadelphia Fire Department throughout the course of this litigation."

On the occasion of the final day of hearing, January 7, 1975, the District Court stated, as set forth at page 1753 of the Appendix for the Third Circuit Court:

> "I would also like to make clear at this time that as far as the Court is concerned, aside from one or two what the Court considered to be minor differences and minor misunderstandings, primarily both sides of this case have advanced their clients' cause with vigor and in the highest keeping of the legal profession as practiced in the United States Courts and that the Court has embodied in its findings several special findings that are intended to make sure there is no misunderstanding as to the Court's attitude in respect to what it believes the performance has been in the past, presently, and expects in the future from both the plaintiff and the City."

Defendants submit that at all times they vigorously and properly represented the interests of the City of Philadelphia, its citizens, the Fire Department, and the employees of the Fire Department.

On hearing the same factual assertions made by Petitioners in their statement of the case in the Petition for Certiorari, the Third Circuit Court of Appeals made an "independent examination of the record" and concluded that the record did not support the contention that Defendants agreed to the injunction *pendente lite* on December 27, 1974, and that the injunction was not a consent decree (Opinion of the Court of Appeals, Appendix A of the Petition, A.10). With respect to Petitioner's claim that Defendants' counsel lulled them into a false belief that the final hearing was to be contested, the Third Circuit Court concluded that, "Examination of the record on this point also renders no support to appellants. There was agreement as to the procedures governing reception of the evidence, but not as to the substantive results of the hearing." (Opinion of the Court of Appeals, Appendix A of the Petition, A.10-11).

This Court should conclude, on the facts of this case as set forth by the Courts below, that no behavior on the part of Defendant-Respondents, or their counsel, in any

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way placed petitioners into a position necessitating untimely intervention into this action.

ARGUMENT

Defendant-Respondents, Joseph R. Rizzo, et al., concur in and adopt the arguments of Plaintiff-Respondents, The Commonwealth of Pennsylvania, et al.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Stephen Arinson
Chief Deputy City Solicitor

Sheldon L. Albert
City Solicitor